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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 08-137

In Regard to the Matter of:

Bayside State Prison

Litigation

Opinion and Report

Of the

DONALD PHELPS,

Special Master

-vs-

ORIGINAL

WILLIAM H. FAUVER, et al,

Defendants.

* * * * *
FRIDAY, FEBRUARY 29, 2008
* * * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

MASTROIANNI & FORMAROLI, INC.

Certified Court Reporting & Videoconferencing

251 South White Horse Pike

Audubon, New Jersey 08106

856-546-1100

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10 A P P E A R A N C E S:

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LOUGHRY & LINDSAY, ESQUIRES

12

BY: LAWRENCE W. LINDSAY, ESQUIRE

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ATTORNEYS FOR THE PLAINTIFFS

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BY: JAMES LAZZARO, ESQUIRE

17

- and -

BY: STEVEN GRIEGEL, ESQUIRE

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HAMILTON SQUARE, NEW JERSEY 08690

19

609-586-2257

ATTORNEYS FOR THE DEFENDANTS

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1 JUDGE BISSELL: We will reopen the
2 record in the matter of Donald Phelps versus William
3 Fauver, et al, assigned a docket number 08-CV-137.

4 This opinion/report is being issued
5 pursuant to the directives of the Order of Reference
6 to a Special Master and the Special Master's
7 Agreement and the guiding principles of law which
8 underlie this decision to be applied to the facts
9 upon which it is based as set forth in the jury
10 instructions in the Walker and Mejias jury charges to
11 the extent applicable to the allegations in Mr.
12 Phelps' case.

13 As finalized after review under Local
14 Civil Rule 52.1, the Transcript of this oral opinion
15 will constitute the written report required by
16 paragraph seven of the Order of Reference to a
17 Special Master.

18 Mr. Phelps was housed in C Unit at the
19 time significant to his case which was about two
20 weeks after July 30, 1997. He had had his foot
21 operated upon to straighten his right big toe and was
22 on crutches with a bandaged foot. He was making
23 regular visits to the infirmary to have his foot
24 dressed and inspected and also for the administration
25 of insulin due to his diabetic condition.

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1 The SOG officers came into C Unit at or
2 about this time, as I said, approximately two weeks
3 after July 30, 1997. He was ordered to strip in his
4 cell, he was not moving with as much agility and
5 speed as the officers would like. He was, therefore,
6 prodded in his ribs. However, it didn't hurt him.
7 The man, compared to his size, (of course, I was able
8 to observe Mr. Phelps, he's a big man) was smaller
9 than Mr. Phelps and, accordingly, this prodding
10 didn't hurt him. However, the man also kicked him in
11 the groin in order to, apparently, speed up Mr.
12 Phelps' compliance. I find that this particular
13 action was excessive, penal in nature and for the
14 purpose of asserting authority unnecessarily. I find
15 that it hurt and that it hurt him throughout the day
16 in the gym.

17 A more serious incident involved here,
18 however, was described by Mr. Phelps beginning at
19 page 35, line 22 of his testimony. The excerpt is
20 not too lengthy and so I'll read it or read from it
21 in the next few minutes.

22 The questions began at line 22: "Did
23 they do anything else to you in your cell?

24 Answer: No, they told me to come
25 outside my cell at that time and told me to lean

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1 against the wall with my forehead on the wall, my
2 hands behind my back with my legs spread out. And
3 that's when the officer came up and was asking me
4 what is all those bandages on my foot for.

5 Question: What did you reply?

6 Answer: I told him I had surgery on my
7 foot and he asked me what type of surgery. I said I
8 had a piece of bone removed from my big toe and then
9 they just stomped my foot.

10 Question: Who stomped your foot?

11 Answer: One of the SOG unit officers.

12 Question: How many times did he stomp
13 your foot?

14 Answer: Like four times.

15 Question: Was this a forceful action?

16 Answer: Yes.

17 Question: Did that hurt?

18 Answer: Yeah.

19 Question: How would you describe the
20 pain?

21 Answer: I started having shooting
22 pain. And they made me, because the doctor told me
23 no weight-bearing on my foot, and when they told me
24 to go to the gym and follow the man in front of me
25 and don't get out of line, they wouldn't let me use

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1 no crutches. So I had to hobble on my foot from my
2 unit to the gym."

3 He then describes speaking with a
4 doctor in the infirmary about this matter and at page
5 41, line five for approximately a page also quoting
6 at this time.

7 "And it was a lady doctor and she was
8 new, I didn't know her name. And that's when they
9 came and took me down to the infirmary to see the
10 doctor. She was asking me what happened to my foot,
11 but the SOG officers on the way there before I came
12 out of my cell, they were telling me if I was to try
13 to start any trouble or try to tell anything on them,
14 they said that I'm going to have problems and stuff
15 you know.

16 So when the doctor was asking me what
17 happened, I said my foot got hurt. And she was like
18 saying how. And I just like looked at her and turned
19 my head toward the officers and she just looked at
20 them and shook her head.

21 Question: Were the SOGs right there
22 when that conversation occurred?

23 Answer: Yes.

24 Question: Did you feel that they were
25 threatening you?

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1 Answer: Yes, they was.

2 Question: Let me rephrase that. Did

3 you feel threatened?

4 Answer: Yes.

5 Question: By the SOGs?

6 Answer: Yes."

7 Once again, as any fact finder

8 endeavoring to exercise common sense and trying to

9 make some determinations as to what makes sense under

10 the circumstances without obviously engaging in fatal

11 speculation, I conclude that there is, indeed, an

12 inherent basis for the truth in the incident as Mr.

13 Phelps describes it. He was a big man and the SOG

14 officers knew it. Frankly, it makes some sense that

15 they would endeavor on the front end to deliver a

16 message to a man of this size, possibly a threat to

17 them, in the most effective way. So under the

18 circumstances they kicked him in the groin and

19 stomped him on an already injured foot.

20 I do determine, of course, that this is

21 indeed excessive and, frankly, malicious and sadistic

22 within the contemplation of the rules of law that

23 apply to the use of excessive force. As I said,

24 there is an inherent common sense in why it might

25 have occurred.

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1 Secondly, as far as the foot was
2 concerned, this was a pre-existing condition. Stomp
3 a man on a foot that's already bandaged and little
4 visible evidence results, for it probably looks the
5 same as it was before. So this also supports a ring
6 of truth to the event as described by Mr. Phelps.

7 Now, a good deal was made, and not
8 surprisingly so, of the entry on the record of the
9 infirmary visit on or about August 14th, 1997, which
10 as described here would be shortly after the event in
11 question.

12 Given the testimony of Mr. Phelps about
13 a reluctance to be completely candid with the
14 examining person, although this does appear to be a
15 nurse's note as opposed to being that of a physician,
16 there is not anything terribly inconsistent between
17 the entry involved here, "continued mild infection",
18 "mild tenderness", "small amount of drainage".

19 Now, they can be read as being
20 attributable to the original condition, but they also
21 are not fatally inconsistent by any means with the
22 description of the events that happened to Mr.
23 Phelps. Indeed, of course, by that time and once
24 again because the foot was bandaged and the
25 tenderness and drainage might not have been that much

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1 more visible. But that doesn't undermine the
2 happening of the incident and the pain inflicted on
3 that occasion.

4 I've also considered the subsequent
5 history to Mr. Phelps' foot. However, I've
6 determined that that was mostly due to the underlying
7 big toe condition itself and to the diabetes which
8 eventually led to the amputation of all of his toes.
9 The impact from the kicking in the groin and the foot
10 stomping was acute and severe at the time, but not of
11 lengthy duration. Nor is there adequate evidence to
12 demonstrate that the eventual amputations were
13 attributable to that event. I also recall an absence
14 of medical testimony that would be needed there.

15 There is no evidence in this matter
16 which this Master finds truly impeaches or undermines
17 the plaintiff's account of the events when confronted
18 with the SOG officers. I find that his explanation
19 for not going into any details shortly after the SOG
20 officers had inflicted this pain upon him was
21 understandable based upon those threats and also, of
22 course, his particular vulnerability. This bandaged
23 foot wasn't going to heal promptly and might remain
24 an obvious target in the future if they were aware
25 that he had made complaints fingering the SOG

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1 officers.

2 The actions directed against Mr. Phelps
3 go well beyond the necessity of any proper law
4 enforcement needs or any proper exercise of
5 discipline or other legitimate penalogical purpose as
6 well defined in the jury instructions which are
7 incorporated here. There was, indeed, excessive and
8 unnecessary and sadistic force imposed upon Mr.
9 Phelps here within the contemplation of those legal
10 principles.

11 However, in light of the fact that the
12 striking of Mr. Phelps was not prolonged or repeated,
13 while actionable for recovery of compensatory
14 damages, I do not find that the assaults visited upon
15 him rose to the level of being so egregious as to
16 support a claim for punitive damages, at least
17 against the unidentified officers who were with him
18 and the one who inflicted the serious injuries.

19 I realize, of course, the fact that the
20 officers were unidentified here, but there will come
21 a time when the issue arises as to whether there is
22 any significance to the conduct by the perpetrators
23 regarding plaintiffs' efforts to establish supervisor
24 liability.

25 I emphasize here again, therefore, and

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1 want to make it perfectly clear that I do not make a
2 finding that the conduct, although actionable, and
3 which supports an award of compensatory damages, was
4 so egregious as to support an award of punitive
5 damages under applicable legal standards.

6 Finally, although not every item of
7 evidence has been discussed in this opinion/report,
8 all evidence presented to the Special Master was
9 reviewed and considered.

10 I find that injury was inflicted and is
11 actionable. I find that it was acute, but rather
12 short in terms of duration and pain attributable to
13 the events in question and, accordingly, recommend in
14 this report that the district court enter an award of
15 compensatory damages in the amount of seven thousand
16 five hundred dollars in Mr. Phelps' favor.

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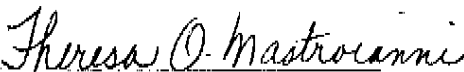
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1 CERTIFICATE

2
3 I, Theresa O. Mastroianni, a Notary Public and
4 Certified Shorthand Reporter of the State of New
5 Jersey, do hereby certify that the foregoing is a
6 true and accurate transcript of the testimony as
7 taken stenographically by and before me at the time,
8 place, and on the date hereinbefore set forth.

9 I DO FURTHER CERTIFY that I am neither a
10 relative nor employee nor attorney nor counsel of any
11 of the parties to this action, and that I am neither
12 a relative nor employee of such attorney or counsel,
13 and that I am not financially interested in the
14 action.

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Theresa O. Mastroianni, C.S.R.

20 Notary Public, State of New Jersey

My Commission Expires May 5, 2010

21 Certificate No. XI0857

22 Date: March 10, 2008
23
24
25

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